BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY A. WEBB	)	
Claimant	)	
	)	
VS.	)	
	)	
ROSE VILLA INC.	)	
Respondent	)	Docket No. **1,047,270**
	)	
AND	)	
	)	
FARMERS INSURANCE EXCHANGE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) and claimant request review of the December 20, 2011 Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on March 21, 2012.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Bren Abbott of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant's personal injury by accident arose out of and in the course of her employment and awarded claimant permanent partial general bodily disability (PPD) benefits as follows: a 74 percent work disability from the date of accident, August 18, 2009, through August 9, 2010; a 42 percent work disability from August 10, 2010, through February 3, 2011; a 19 percent functional impairment from February 4, 2011, through October 31, 2011; and commencing on November 1, 2011, a 30 percent work disability.

Respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of her employment; (2) the nature and extent of claimant's disability; and, (3) whether the ALJ erred in computing claimant's PPD. Claimant also raises the issue of the nature and extent of her disability and "[w]hether the Claimant is entitled to designate her own physician since respondent refused to provide one."[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the October 27, 2009 preliminary hearing[2] claimant testified that she was employed for respondent as a care giver. She described her accident:

> Q. Now, explain to the court what happened on [Tuesday] August 18th, 2009?
>
> A. Well, I was coming to Topeka[3] to visit my daughter and grandkids, and I stopped by Rose Villa to see if Jay [Nichols, respondent's owner] had had [sic] checks written because he said we get paid on a Wednesday but he said usually checks would be made out on Tuesday so you could come and pick it up. So while I was here, I went by there and I asked the gentleman, Reggie[4], was checks in and he said yeah, they are on Jay's desk. So as I was going back there to open up, unlock the kitchen, I fell real hard in a puddle of water.[5]

Claimant had previously spoken directly to Jay Nichols about picking up her paychecks in person. After claimant fell, Reggie and another man helped her up from the floor. She sat in a chair for about 15-20 minutes, then picked up her paycheck and left respondent's premises.

Claimant also testified at the preliminary hearing:

> Q. And typical pay period was weekly; is that correct?
>
> A. Every two weeks.

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[1] Claimant's Application for Review at 1.

[2] The parties stipulated that the preliminary hearing testimony and the exhibits should be considered a part of the record. R.H. Trans. (Sep. 1, 2011) at 6, 7.

[3] Claimant lived in Ottawa, Kansas, and respondent was located in Topeka, Kansas.

[4] Reggie Hayes, one of claimant's co-employees.

[5] P.H. Trans. at 9-10.

Q. Every two weeks? And the checks would typically be ready for you, the pay periods were Monday to Monday; was that your understanding?

A. Yes.

Q. And typically the policy with the company was that the paychecks would be ready for you on Wednesday; is that correct?

A. Yes.

Q. And on -- occasionally the bookkeeper or Jay would have those checks ready early, and if that was the case, employees could pick up those checks early?

A. Yes.

Q. And on the particular day of this fall, you happened to call in and ask if the checks were ready, and you were told they were; is that correct?

A. Well, I didn't call. I came up here.

Q. Okay. So it was a day that you were not scheduled to work, correct?

A. Yes.[6]

Jay Nichols testified at the preliminary hearing and also by evidentiary deposition. Respondent's formal policy was that paychecks were available to employees on Wednesdays but that employees were free to pick up their paychecks on Tuesdays if the checks had been prepared early. Mr. Nichols testified he was not claiming that claimant violated company policy by going to respondent's facility to pick up her paycheck on a Tuesday when she was not scheduled to work.

When she testified at the September 1, 2011, regular hearing, claimant was 59 years old. She started working for respondent on July 29, 2009. Claimant's regular hearing testimony is somewhat at variance with her preliminary hearing testimony. It's unclear, for example, whether claimant called respondent on August 18, 2009, before stopping by to pick up her check. It is also unclear whether claimant was coming to Topeka on the date of accident specifically to pick up her check or whether claimant was coming to Topeka to see her daughter and grandchildren and just incidentally dropped by respondent's location to obtain her check. It is, however, clear that claimant injured her low back and right shoulder in the fall; that the fall occurred inside respondent's premises; that claimant was not scheduled to work on the date of accident; but that claimant did not violate respondent's policy by going to respondent's facility on a Tuesday to pick up her check. There is no evidence suggesting claimant went to respondent's facility on August 18, 2009, for any purpose other than picking up her check.

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[6] P.H. Trans. at 22-23.

Claimant apparently went on her own to St. Francis Medical Center on August 20, 2009, where lumbar x-rays were taken which indicated the presence of extensive degenerative changes and scoliosis with convexity to the right. Claimant initially received authorized medical treatment at Tallgrass Immediate Care on August 25, 2009. Claimant was provided with pain medication. X-rays taken of the low back on August 25, 2009 revealed mild disc space narrowing at L5, S1. Claimant was examined by Dr. Laurel Vogt, who diagnosed a back strain and contusion. Claimant's employment with respondent was terminated on August 20, 2009, two days after the accidental injury.

Eventually, Dr. Thomas Shriwise, an orthopedic specialist, performed surgery on claimant's right shoulder on June 7, 2010. The surgery consisted of arthroscopic subacromial decompression and distal clavicle excision.

Claimant did not work from the date of her accident through August 9, 2010. Claimant started working for Family Living on August 10, 2010, earning $7.50 per hour. At Family Living, claimant worked two 12-hour shifts per week for a total of 24 hours a week or $180. Claimant received a raise from Family Living, however, as discussed below, the evidence is conflicting regarding the amount of the raise and the date the raise went into effect. Claimant was still employed at Family Living.

Claimant was also employed at Topeka Resource Center for Independent Living (TRCIL). Her employment for TRCIL commenced on February 4, 2011, and ended on September 17, 2011. While employed at TRCIL claimant worked 31 hours a week earning $8 per hour for a total of $248 a week.

Commencing in early June 2011 claimant began working for Mason Memory earning $64 a week ($8.00 per hour for 8 hours a week). Then beginning June 13, 2011, and continuing through October 31, 2011, claimant worked for Community Works earning $114.08 a week ($8.45 per hour for 13.5 hours a week).

Claimant testified her current symptoms consist of loss of strength, loss of motion, and loss of feeling in her right shoulder. She is also experiencing pain in her back radiating into her right leg. Claimant was taking pain medication for her right shoulder and back.

Dr. Daniel Zimmerman examined claimant on March 21, 2011, at the request of claimant's attorney. X-rays of the right shoulder and lumbosacral spine were taken in the doctor's office. The AP view and axillary view of the right shoulder demonstrated a widened acromioclavicular joint consistent with surgical intervention. The PA view of the lumbosacral spine revealed normal vertebral alignment. The lateral view demonstrated disk space narrowing at L5-S1 and osteoarthritic changes in the lower lumbar spine. At the time of his examination, Dr. Zimmerman opined claimant had achieved maximum medical improvement.

Dr. Zimmerman's diagnoses were right rotator cuff injury; left shoulder impingement syndrome; and permanent aggravation of lumbar disk disease at L5-S1 as well as permanent

aggravation of osteoarthritis affecting the lumbar spine. The doctor opined that claimant's slip and fall while working for respondent was the cause of claimant's injuries.

Based on the AMA *Guides*[7], Dr. Zimmerman found that claimant sustained a 20 percent permanent impairment to the right upper extremity at the shoulder due to the right rotator cuff injury. The 20 percent right upper extremity impairment converts to a 12 percent whole person functional impairment. Dr. Zimmerman also found a 4 percent permanent impairment to the left shoulder, which converts to 2 percent to the whole person. Due to permanent aggravation of claimant's lumbar disk disease at L5-S1 and permanent aggravation of osteoarthritis in the lumbar spine, Dr. Zimmerman provided a 10 percent impairment to the body as a whole. Using the Combined Values Chart, Dr. Zimmerman concluded claimant had an aggregate permanent functional impairment of 23 percent to the body as a whole. Per the AMA *Guides*, Dr. Zimmerman's rating, excluding the left shoulder, is 21 percent to the body as a whole.

Dr. Zimmerman recommended that claimant observe the following permanent restrictions: (1) avoid work activity at shoulder height or above; (2) avoid frequent flexing of the lumbosacral spine; (3) avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level. The doctor opined claimant's pain and discomfort may be treated in a self-directed manner with aspirin (which claimant was already taking) and heat in the form of hot tub baths, hot showers and/or a heating pad applied locally.

Dr. Zimmerman reviewed the list of claimant's work tasks prepared by vocational consultant Dick Santner and concluded claimant could no longer perform 19 of the 22 tasks for an 87 percent task loss.

Dr. Terrance Pratt examined claimant at the request of respondent's attorney on August 22, 2011. The doctor diagnosed low back pain with preexisting degenerative disc disease; right shoulder syndrome with preexisting acromioclavicular degenerative disease; and status post right arthroscopic subacromial decompression with distal clavicle excision and debridement. Dr. Pratt found evidence that claimant exaggerated her symptoms.

Based upon the AMA *Guides*, Dr. Pratt concluded claimant sustained a 5 percent permanent whole body impairment due to her lumbosacral involvement. Dr. Pratt apportioned 2 percent of the 5 percent to preexisting disease, leaving 3 percent body impairment related directly to claimant's accidental injury. He also rated claimant's right shoulder at 17 percent permanent impairment of function. However, he apportioned 6 percent impairment of the 17 percent right shoulder rating to preexisting degeneration, leaving 11 percent impairment directly related to the right shoulder injury. Seventeen percent to the right shoulder converts to 12 percent to the body and 11 percent to the right shoulder converts to 7 percent whole person impairment. Using the AMA *Guides'* combined values chart, Dr.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Pratt's whole body rating, including the impairment he excluded for preexisting degenerative disease, is 16 percent to the whole person. If such preexisting disease is not included, the rating is 10 percent to the whole body.

Dr. Pratt recommended claimant avoid repetitive overhead activities with her right upper extremity. He also recommended that claimant refrain from frequent low back bending or twisting; lifting greater than 25 pounds occasionally and 15 pounds frequently; overhead lifting on the right greater than 15 pounds occasionally; and, pushing and pulling in excess of 50 pounds.

Dick Santner interviewed claimant on December 7, 2010, at the request of claimant's attorney. He prepared a task list of 22 nonduplicative tasks claimant performed in the 15-year period before her injury.

Karen Terrill interviewed claimant via telephone on September 12, 2011, at the request of respondent's attorney. She prepared a task list of 38 nonduplicative tasks claimant performed in the 15-year period before her injury.

Dr. Pratt reviewed the list of claimant's work tasks prepared by Dick Santner and concluded claimant could no longer perform 9 of the 22 tasks for a 41 percent task loss. Dr. Pratt also reviewed a task list prepared by vocational counselor Karen Terrill, however, that task list was incomplete because the list only included 22 of the 38 work tasks identified by Ms. Terrill.[8] Accordingly, Dr. Pratt's opinion regarding claimant's task loss using the task list of Ms. Terrill is entitled to no weight.

With regard to the left shoulder, Dr. Pratt concluded claimant sustained no injury or permanent impairment related to the accident.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an

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[8] Dr. Pratt Depo. at 20-22, 25, & 26; Pratt Depo., Ex. 3.

[9] K.S.A. 2010 Supp. 44-501(a).

accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

When an injury does not fit within the schedule contained in K.S.A. 44-510d, permanent partial general disability is determined by the provisions of K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[11] *Id.* at 278.

Wage loss in the work disability formula is determined by comparing claimant's post-injury earnings with claimant's pre-injury average weekly wage.[12]

There is no dispute that claimant sustained personal injury by accident when she injured her low back and right shoulder on Tuesday, August 18, 2009. However, respondent maintains claimant's injury by accident did not arise out of and in the course of her employment because:

> The appellee/claimant was not on duty when the accident occurred; she was not even scheduled to work that day. She took it upon herself to stop by the appellant/respondent's [facility] to see if her paycheck was available. There is not any statutory authority to provide temporary total disability and, therefore, permanent partial disability under these facts.[13]

There is little merit in respondent's argument. The Board agrees with the ALJ that the opinions of our Court of Appeals in *Mendoza*[14] and *Palmer*[15] are dispositive of this issue. In *Mendoza*, claimant was injured when he fell outside the offices of his employer where he had been directed to pick up his paycheck for work performed at another location. In finding the injury arose out of and in the course of employment, the Court concluded the business of employment in this state necessarily includes the payment of wages to employees. The Court found applicable the recognized exception to the going and coming rule for a task that was necessary to his employment and that furthered the interests of his employer, so that his injury in his travels in connection with that task are compensable.

In *Palmer*, the employer's facility was closed to the public, but was open only to employees so that the employees could pick up their paychecks. While on the employer's premises to get her paycheck, claimant suffered personal injury. The Court found that claimant's accidental injury arose out of and in the course of employment and that under the circumstances of that claim, the employer cannot escape workers compensation liability.

As in the *Mendoza* and *Palmer*, claimant in this claim did not violate respondent's policy by picking up her paycheck at respondent's place of business on her day off. Mr. Nichols testified that claimant did not violate respondent's policy in picking up her check as she did on the date of accident. His testimony is consistent with claimant's testimony. Claimant's personal injury by accident on August 18, 2009, arose out of and in the course of her employment.

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[12] *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

[13] Respondent's brief at 5 (filed January 23, 2012).

[14] *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 152 P.3d 1270 (2007).

[15] *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

With regard to the nature and extent of claimant's disability, there is no dispute that claimant suffered a general bodily injury and not a scheduled injury. Hence, claimant's PPD must be computed pursuant to K.S.A. 44-510e. The Board agrees with the ALJ that claimant's permanent impairment of function is 19 percent to the whole body, which is slightly above a "split" between Dr. Zimmerman's rating, excluding any impairment to the left shoulder, and Dr. Pratt's rating, including the impairment for preexisting conditions he excluded. Claimant's allegations of permanent injury to the left shoulder are unfounded. Dr. Pratt concluded that claimant's injuries are limited to the low back and right shoulder and that the left shoulder does not relate to the accidental injury. The ALJ properly found that there was no basis upon which to reduce claimant's impairment of function based on preexisting impairment. K.S.A. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e requires that functional impairment be determined based upon the AMA *Guides.* The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.[16] It is well settled under the law applicable to this claim that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[17] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[18]

On the issue of work disability, claimant argues that her task loss should be 60 percent or higher. However, the Board agrees with the ALJ's findings that claimant's task loss is 48 percent considering the testimony of both Drs. Pratt and Zimmerman. Although the ALJ erred, for the reasons stated above, in providing any weight to Dr. Pratt's task loss opinion using only a partial list of work tasks compiled by Karen Terrill, the conclusion regarding task loss is nevertheless correct and is adopted by the Board. Dr. Pratt's task loss opinion is accorded greater weight than the task loss opinion of Dr. Zimmerman because it is unclear to what extent Dr. Zimmerman considered the left shoulder in formulating his restrictions and arriving at his opinion regarding task loss.

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[16] *Leroy v. Ash Grove Cement Company*, No. 88,748, 66 P.3d 944 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

[17] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[18] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

The parties agree with the periods of work disability and functional impairment found by the ALJ, however, they do not agree on the answers to these questions: When did claimant receive a raise from Family Living? What was the amount of the raise? Is claimant entitled to additional work disability benefits on and after November 1, 2011? The evidence, regarding these questions is conflicting. There is no documentary evidence in the record concerning claimant's post-injury earnings. Only claimant's testimony addresses these issues.

Claimant testified that she began her employment at Family Living on August 10, 2010, for 24 hours a week at $7.50 per hour. When claimant was interviewed by Mr. Santner in December 2010, claimant was still working 24 hours a week at $7.50 per hour.[19] However, at the September 1, 2011 regular hearing, claimant testified that she was earning $7.75 per hour and that she had received a raise from Family Living from $7.50 to $7.75 per hour effective on September 1, 2011.[20] Claimant was interviewed by Ms. Terrill on September 26, 2011, at which time claimant was being paid $7.75 per hour by Family Living.[21] Claimant's regular hearing testimony was completed by evidentiary deposition on October 21, 2011. At that deposition, claimant testified that she was earning $8 per hour at Family Living.[22]

Although the evidence is in conflict, the Board finds the preponderance of the credible evidence establishes that effective on November 1, 2011, claimant was earning a total of $250.64 per week, consisting of $64 from Mason Memory and $186 ($7.75 X 24) from Family Living. Claimant's weekly earnings were 12 percent less than claimant's average weekly wage of $282.48. Adding 12 percent wage loss to 48 percent task loss, and dividing the sum by 2 equals a 30 percent work disability, as found by the ALJ and which is adopted by the Board.

Claimant contends that the ALJ's award should be modified to provide claimant with an authorized physician for ongoing medical care. At oral arguments counsel for the parties advised that this issue had been worked out between the parties if the claim is held to be compensable, which it is. Accordingly, the Board will not address the issue, except to find that if there are further issues regarding medical treatment, they may be brought before the ALJ under K.S.A. 44-510k.

The Board concludes as follows:

(1) Claimant's personal injury by accident arose out of and in the course of her employment.

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[19] Santner Depo., Ex. 2 at 3.

[20] R.H.Trans. (Sep. 1, 2011) at 12, 13, & 15.

[21] Terrill Depo., Ex. 2 at 2.

[22] R.H. Trans. (Oct. 21, 2011) at 13.

(2) The findings of the ALJ regarding claimant's functional impairment and work disability are adopted by the Board.

(3) The ALJ correctly computed claimant's permanent partial disability.

(4) The record reveals no error in the findings of the ALJ regarding claimant's entitlement to future medical compensation.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[23] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 20, 2011, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge

[23] K.S.A. 2010 Supp. 44-555c(k).